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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

GENERAL ELECTRIC COMPANY,
WESTINGHOUSE ELECTRIC CORPORATION,
and MONSANTO COMPANY,
Petitioners,

v.

ROBERT K. JOINER and KAREN P. JOINER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF *AMICI CURIAE*, THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND MEDMARC, IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE* *

The Product Liability Advisory Council, Inc. ("PLAC") is a nonprofit corporation with 114 corporate members from a broad cross-section of American industry, and the

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* Pursuant to S. Ct. R. 37.6, counsel for *amici curiae* state that this brief was not authored in whole or in part by a party and that no person or entity, other than the *amici curiae*, its members and its counsel, made a monetary contribution to the proportion or submission of this brief.

product liability lawyers who represent them. Its corporate members include manufacturers and sellers in industries ranging from electronics to automobiles to pharmaceutical products and medical devices.[1] PLAC's purpose is to file *amicus* briefs on behalf of its members on issues that affect the law of product liability. PLAC has submitted many *amicus* briefs in state and federal courts, including this Court.

The National Association of Manufacturers (the "NAM") is the nation's oldest and largest broad-based industrial trade association. Its more than 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately eighty-five percent of all manufacturing workers and produce over eighty percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with the NAM through its Associations Council and National Industrial Council. The NAM's interest on issues that affect the law of product liability is identical to the interest of PLAC.

MEDMARC is a specialty insurer which provides product liability coverage for medical device manufacturers. Owned and controlled by its members, MEDMARC was founded in 1979 in response to volatile conditions in the commercial insurance market for product liability insurance. MEDMARC's membership includes approximately 550 manufacturers and distributors of medical devices and diagnostic products.

The issue before this Court is the proper standard of review of trial court decisions admitting or excluding expert evidence *Amici curiae* are well-situated to address this issue. Their members are subject to defending an increasing number of product liability lawsuits. Expert testimony is the rule, not the exception in those cases.

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[1] A list of PLAC's corporate members appears in the appendix hereto.

Amici curiae regularly face appeals on issues relating to the propriety of expert evidence.[2]

SUMMARY OF ARGUMENT

The standard of review for trial court decisions concerning the admissibility of evidence including admission or exclusion of expert testimony has been the deferential abuse of discretion standard. The Eleventh Circuit in *Joiner v. General Electric*, 78 F.3d 524, 535 (11th Cir. 1996) applied a "particularly stringent" standard of review to the trial court's exclusion of expert testimony, even though the trial court did not misapprehend the law applicable to the issue. It created a double standard of review, dependent on whether the trial court admitted or excluded the evidence. Other courts have suggested multiple standards of review, dissecting the admissibility ruling into components in which different standards are applied. Still other courts apply multiple standards depending upon the final outcome of the admissibility decision, namely whether it results in summary judgment or directed verdict.

What is the proper standard of review for a trial court's decision on the admission or exclusion of evidence from experts? This is the limited issue before the Court. *Amici* agree with this Court that the trial court is best situated and fully capable of fulfilling the gatekeeper role more fully defined in *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993). Those duties vary little from the obligations successfully carried out by the trial courts prior to *Daubert*. It is an unnecessary waste of time and resources for appellate courts to revisit the admissibility determination as if taking a first look at the matter.

While the Federal Rules of Evidence freed the trial courts from the strictures of some common law exclu-

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[2] The Parties' written consent to the submission of this brief is on file with the Court.

sionary rules and formalistic requirements, thus "liberalizing" the admission of evidence, the changes in the law of evidence contained within the Rules provide no justification for abandoning the traditional abuse of discretion standard of review. The "liberal thrust" of the Rules does not suggest that the reliability gate has been cracked open to permit unreliable evidence to slip through. The parameters within which evidence must fall to be deemed reliable have been merely broadened and clarified. The "liberal thrust" of the Rules is in fact related to their flexibility. With that flexibility is the recognition that the trial court has broad discretion with respect to application of the Rules to each particular case. Adoption of a "particularly stringent" standard of review will not encourage trial judges to be flexible.

If the resolution of the admissibility question is fatal to a party's case, and results in summary judgment or a directed verdict, that is no grounds to impose a stricter standard of review than abuse of discretion. The trial courts have had little difficulty resolving the admissibility issues first, and then evaluating the merits of dispositive motions. The trust this Court has in the trial courts to fulfill the gatekeeper role is well-placed. In *Daubert*, the trial court's discretion was broadened to consider additional factors in evaluating the reliability of testimony proffered by experts. That discretion must be respected by the appellate courts faced with challenges to the trial court's rulings. To do otherwise, and permit the appellate court to substitute its judgment for that of the trial court, strains against judicial precedent and wastes judicial resources.

This court should reaffirm that the abuse of discretion standard applies to all trial court determinations of the admissibility of expert evidence.

ARGUMENT

I. THE ABUSE OF DISCRETION STANDARD OF REVIEW SHOULD BE CONSISTENTLY APPLIED WHETHER THE TRIAL COURT ADMITS OR EXCLUDES EXPERT EVIDENCE, OR WHETHER A DECISION TO EXCLUDE RESULTS IN SUMMARY JUDGMENT OR DIRECTED VERDICT

A. Introduction

The decision to admit or exclude expert evidence may be based on evidence rules 401, 402, 403, 404(b), 702, 703, and/or a variety of statutes. Further, the effect of an evidentiary ruling may vary, from a simple limitation on the scope of certain evidence to complete exclusion of a witness. In some cases, summary judgment or directed verdict may follow, if the evidence excluded is crucial to a party's case.

Until very recently, circuit courts have unanimously evaluated all lower court evidentiary decisions for abuse of discretion or manifest error.[3] The reasons for according such deference to the trial court are manifest: 1) the trial judge is in the best position to evaluate the proffered testimony in the context of the entire case; 2) the trial judge is called upon to make so many evidentiary rulings in the course of a single case that the appellate courts can ill afford to carry the burden of reviewing every such ruling; 3) a heightened level of review of each evidentiary ruling will increase the frequency of appeals. Rulings on the admissibility of expert testimony are based largely on helpfulness to the jury, which of necessity, require the exercise of discretion. In the past, the standard of review has not been dependent upon whether the evidence was admitted or excluded. It did not matter which evidence rules formed the basis for the decision, the stage in the

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[3] 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence*, ¶ 702.02[2] (2d ed. 1997) at 702-7: "There is no substantive difference between 'manifest error' and 'abuse of discretion.'"

proceeding when the issue was raised, or whether the decision led to the grant of a dispositive motion; the rulings were reviewed for abuse of discretion.

To apply different standards of review according to the result of the decision or the precise basis enunciated for the decision, as some circuits now do, is to end decades of uniform jurisprudence, and to add complexity and confusion to an issue that needs clarity and consistency. The abuse of discretion standard has worked for over a century because it fosters finality of the trial court's decision, recognizes the trial court is better situated to make the decision, is simple to apply and makes sense. The *Daubert* decision does not suggest that a double standard is appropriate. To the contrary, this Court reaffirmed its confidence in the trial court to determine the reliability of expert evidence. The decision to admit or exclude that testimony has always involved the analysis of the reliability of the evidence, and now carries the same ramifications as before. Because expert evidence may be admitted or excluded under a variety of rules, the imposition of a stricter scrutiny for trial court rulings which exclude evidence under Rule 702 creates a pigeon hole for review which ignores the interdependency of the Rules.

B. Admission Versus Exclusion

In *Joiner*, the Eleventh Circuit created a double standard when it applied "a particularly stringent standard of review to the trial judge's exclusion of expert testimony," 78 F.3d at 529,[4] thus advocating a lesser standard where the trial court *admits* expert testimony. The Rules themselves provide no support for a double standard; they are neutral with respect to admission or exclusion. Commentators have said correctly that the Rules provide the trial judge with "broad discretion to admit or exclude testimony under the test of 'helpfulness.'" J. Weinstein, *Weinstein's Federal Evidence*, ¶ 702.02[02], (2d ed. 1997).

[4] It applied a new standard because the rules "display a preference for admissibility." *Id.* at 529.

In suggesting that "a hard look" should be taken, appellate courts have expressed their concern about trial court decisions to admit or exclude: the Fifth Circuit has been concerned about the trial courts letting too much in [5]; the Third and Eleventh Circuits are concerned about the trial courts keeping too much out.[6] If the *Joiner* double standard is applied, the trial courts will be encouraged to circumvent their gatekeeper duties, find a way around the reliability gate, and admit the junk science *Daubert* and the Rules meant to exclude. If a stricter standard were applied to admission decisions, courts may escape scrutiny by excluding that evidence which is sufficiently reliable to meet the helpfulness standard of Rule 702.

The problems with a double standard are compounded by some circuits which apply a stricter standard looking to the end result of the trial court's admissibility determination, not the foundation for it. Thus, in *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 750 (3d Cir. 1994), the Third Circuit stated:

> [W]hen the district court's exclusionary evidentiary rulings with respect to scientific opinion testimony will result in a summary or directed judgment, we will give them a "hard look" . . . to determine if a district court has abused its discretion in excluding evidence as unreliable.

[5] *In Re Air Crash Disaster at New Orleans*, 795 F.2d 1230, 1234 (5th Cir. 1986): "In sum, we adhere to the deferential standard for review of decisions regarding the admission of testimony by experts. Nevertheless, we take this occasion to caution that the standard leaves appellate judges with a considerable task. We will turn to that task with a sharp eye, particularly in those intances, hopefully few, where the record makes it evident that the decision to receive expert testimony was simply tossed off to the jury under a 'let it all in' philosophy. Our message to our able trial colleagues: it is time to take hold of expert testimony in federal trials."

[6] *See In re: Paoli R.R. Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994) and *Joiner, supra*.

See also Ambrosini v. Labarraque, 101 F.3d 129, 132 (D.C. Cir. 1996) (applying de novo standard of review because decision to exclude testimony resulted in summary judgment). This view fails to recognize that the trial courts have had little trouble evaluating the admissibility of evidence first, and considering subsequently whether summary judgment or directed verdict are proper.[7] *See, e.g., Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 320 (7th Cir. 1996); *Buckner v. Sam's Club, Inc.*, 75 F.3d 290, 292-93 (7th Cir. 1996); *Barrett v. Atlantic Richfield Co.*, 95 F.3d 375, 383 (5th Cir. 1996).

There is no reason to apply different standards of review to decisions that result in exclusion instead of admission. We know that only reliable testimony is admissible; the suggestion that a stricter standard is needed when testimony is excluded misconstrues the "liberal thrust" of the Rules. The courts that impose heightened scrutiny to decisions excluding testimony recite that the Rules changed the criteria for admission of some kinds of evidence, and liberalized admission. *See, e.g., In re Paoli, supra; Joiner, supra.* The notion that the federal rules liberalized the standards of admission comes from the abrogation of certain restrictive common law doctrines and technicalities concerning evidence, including the foundation required for expert testimony.[8] *See* Federal Rules of Evidene 702, 703, 704, 705; *Arcoren v. United States*, 929 F.2d 1235, 1239 (8th Cir. 1991); *Krist v. Eli Lilly & Co.*, 897 F.2d 293, 298 (7th Cir. 1990); *Soden v. Freightliner Corp.*, 714 F.2d 498 (5th Cir.

[7] *See*, Fed. R. Civ. P. 56(e). Motions for summary judgment depend upon the existence of admissible evidence.

[8] Meeting the goals of the Rules has greater significance than technical perfection. F.R.E. 102. The Rules merged the concepts of materiality and relevance, eliminated the needless formality of the "best evidence" rule, eliminated the "uncalled witness rule," and permit experts to base their opinions on evidence which may be inadmissible if it is information reasonably relied upon by experts in the field. *See* generally Weinstein, *supra*, at ¶ 102.02[1]-[5]

1983); *Seese v. Volkswagenwerk A.G.*, 648 F.2d 833, 844 (3d Cir. 1981); *Bauman v. Centex*, 611 F.2d 1115, 1120 (5th Cir. 1980); *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 672-73 (D.C. Cir. 1977); *United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974). Recall that prior to the adoption of the Rules, opinion testimony was generally disfavored because opinions invaded the province of the jury. Further, if opinion testimony was permitted it was severely restricted by devices like the hypothetical question, or unrealistic foundation requirements. See 4 J. Weinstein, *Weinstein's Federal Evidence*, ¶ 702.02[1], 703.02, 03[1] (2d ed. 1997). The Rules were crafted to address these problems. However, the Rules favor admissibility of *reliable* evidence only; the "liberal thrust" of the federal rules does not suggest that the gates have been lowered to admit unreliable evidence.

The first Supreme Court decision to address the standard of review of expert testimony admissibility was *Spring Co. v. Edgar*, 99 U.S. 645, 658 (1878), in which the Court stated: "Cases arise where it is very much a matter of discretion with the court whether to receive or exclude the [expert] evidence; but the appellate court will not reverse in such a case, unless the ruling is manifestly erroneous." Next, *Salem v. United States Lines Co.*, 370 U.S. 31, 35 (1962), reaffirmed that "the trial judge has broad discretion in the matter of the admission or exclusion of expert evidence, and his action is to be sustained unless manifestly erroneous." Thus, the same discretionary standard applies regardless of the result of the trial court's decision, i.e., admission or exclusion.

This Court in *Daubert* validated the exercise of that discretion when it explicitly entrusted to the trial courts the gatekeeper role, and expressed its confidence in federal judges' ability to undertake the *Daubert* analysis.[9] No

[9] *Daubert v. Merrell Dow Pharms., supra*, set forth the factual matters a trial court should weigh in deciding on expert admissi-

mention was made of restricted discretion if the decision was to exclude evidence. Indeed, in *In re Joint Eastern & Southern Dist. Asbestos Litigation*, 52 F.3d 1124, 1132 (2d Cir. 1995), the Second Circuit opined that "[t]he Daubert Court significantly changed the standards governing the admissibility of scientific evidence by *expanding* district courts' discretions to evaluate the reliability and relevance of contested evidence." (emphasis added) *See also* 1 Steven Alan Childress & Martha S. Davis, *Federal Standards of Review*, at 4.02, at n. 12 (2d ed. Supp. 1996) (With respect to application of *Daubert*, "it is apparent that most of the decision making is located in the trial judge, which is consistent with . . . abuse of discretion review"); G. Michael Fenner, *The Daubert Handbook: The Case, Its Essential Dilemma, and Its Progeny*, 29 Creighton L. Rev. 939, 1028 (1996) ("The standard of review of Daubert testing on appeal is pretty clear. Though the words vary, the meaning is the same: almost all of the cases say the standard is broad or deferential, it is a clearly erroneous standard, it looks for manifest or clear abuse of discretion").

Implicitly acknowledging this expanded discretion, almost all the circuits have consistently applied the deferential review in post-*Daubert* cases involving Rule 702. *See Lust by & Through Lust v. Merrell Dow Pharms., Inc.*, 89 F.3d 594, 597-98 (9th Cir. 1996) (stating that the district court did not abuse its discretion in concluding that, under *Daubert*, the methodology underlying the proffered expert witness's testimony was not scientific); *Compton v. Subaru of Am., Inc.*, 82 F.3d 1513, 1517 (10th

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bility. *Daubert* requires district judges to act as gatekeepers to ensure that scientific evidence is both relevant and reliable. 509 U.S. 589. This entails two inquires: whether the reasoning and methodology underlying the testimony is scientifically valid, and whether the reasoning and methodology can properly be applied to the facts. *Id.* at 592-93. The Supreme Court is "confident that federal judges possess the capacity to undertake this review." *Id.* at 593.

Cir. 1996) *cert. denied* —— U.S. —— (1997) (upholding trial court's admission of expert testimony under an abuse of discretion standard); *United States v. Shay*, 57 F.3d 126, 132 (1st Cir. 1995) ("A district court's decision to admit or exclude expert testimony is entitled to great deference"); *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1042 (2d Cir. 1995) ("The decision to admit expert testimony is left to the broad discretion of the trial judge and will be overturned only when manifestly erroneous."); *Government of the Virgin Islands v. Sanes*, 57 F.3d 338, 341 (3d Cir. 1995) ("Whether to allow scientific or technical expert testimony . . . is within the discretion of the district court and is reviewed only for abuse."); *Benedi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378, 1384 (4th Cir. 1995) ("Daubert clearly vests the district courts with discretion to determine the admissibility of expert testimony."); *Pedraza v. Jones*, 71 F.3d 194, 197 (5th Cir. 1995) (stating that "the district court did not abuse its discretion" in concluding that the proffered expert testimony did not satisfy Daubert's reliability requirements); *American & Foreign Ins. Co. v. General Electric Co.*, 45 F.3d 135, 137 (6th Cir. 1995) (trial court's admission or exclusion of expert evidence is to be sustained unless "manifestly erroneous"); *Deimer v. Cincinnati Sub-Zero Prods., Inc.*, 58 F.3d 341, 344 (7th Cir. 1995) (decision to allow expert testimony is within the broad discretion of the trial judge and is to be sustained on appeal unless "manifestly erroneous."); *Pestel v. Vermeer Mfg. Co.*, 64 F.3d 382, 384-85 (8th Cir. 1995) ("The [District] Court concluded that the testimony was not scientifically valid and would not aid the jury in its fact finding. We do not find that the District Court abused its discretion in any of its analysis."); *Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549, 567-68 (D.C. Cir. 1993) (notwithstanding abuse of discretion standard, trial court erred by allowing certain expert testimony).

C. The Same Standard Should Be Applied Regardless of Dependent Motions: Summary Judgment or Directed Verdict Are Not Disfavored

Every ruling on evidence affects the outcome of the case to a greater or lesser degree. The standard of review should not change where the exclusion of expert testimony results in summary judgment or a directed verdict in favor of the moving party. In the first instance, two separate legal inquiries are involved. Thus, in *Lust, supra*, 89 F.3d at 596-97, the Ninth Circuit stated:

> We review a grant of summary judgment de novo, . . . and an F.R.E. 702 ruling for an abuse of discretion. The abuse of discretion standard applies to an F.R.E. 702 ruling even though the ruling was dispositive of a motion for summary judgment.

Similarly, in *Duffee by and Through Thornton v. Murray Ohio Mfg. Co.*, 91 F.3d 1410, 1411 (10th Cir. 1996), the Tenth Circuit affirmed summary judgment in favor of the defendant manufacturer after upholding the exclusion of the plaintiffs' expert witness under an abuse of discretion standard. The *Duffee* Court noted that a *de novo* standard applies to summary judgment decisions, but held that the evidentiary admissibility decisions of the trial court are properly reviewed under the traditional abuse of discretion standard. *Id.*

There is no need for different standards of review of the admission decision is fatal to a party's case. Summary judgments and directed verdicts rise or fall depending on what admissible evidence has been presented to make a *prima facie* case. Appellate courts have no trouble addressing first the admissibility of evidence under an abuse of discretion standard, then the summary judgment or directed verdict under a *de novo* standard. Thus, numerous appellate courts apply a deferential standard of review

to *Daubert* rulings, even though summary judgment resulted.[10]

Trial courts have shown, again and again, that this Court did not err in entrusting the *Daubert* analysis, in the first place, to the lower courts, regardless of whether the trial judge admitted or excluded the expert evidence. There is no dearth of cases in which the trial judge has performed a thorough and well-reasoned *Daubert* analysis, and decided to admit proffered expert evidence. *See, e.g., Kieffer v. Weston Land, Inc.*, 90 F.3d 1496 (10th Cir. 1996); *Markman v. Westview Instruments, Inc.*, 52 F.3d 967 (Fed. Cir. 1995); *Hose v. Chicago Northwestern Transp. Co.*, 70 F.3d 968 (8th Cir. 1995); *United States v. Quinn*, 18 F.3d 1461 (9th Cir. 1994); *Virgin Island v. Penn*, 838 F. Supp. 1054 (D.V.I. 1993); *Benedi, supra*; *McCullock, supra.*

Trial courts have performed the *Daubert* analysis in a reasonable and careful manner when they have decided to

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[10] *See, e.g., Goewey v. U.S.*, 1997 U.S. App. LEXIS 1528 at *6-7 (4th Cir. Jan. 30, 1997) ("we cannot say that the district court abused its discretion in excluding this expert testimony as 'not sufficiently reliable' under *Daubert*, . . . or that it erred in rejecting the expert testimony under Baughman. Accordingly, we affirm the district court's grant of summary judgment"); *Wintz by & Through Wintz v. Northrop Corp.*, 110 F.3d 508, 512 (7th Cir. 1997) ("Trial judges enjoy wide latitude and discretion when determining whether to admit expert testimony, and the district court's decision concerning admissibility of such testimony (provided it follows the Daubert methodology) will not be disturbed unless 'manifestly erroneous'"; summary judgment affirmed); *Barrett, supra*, 95 F.3d at 383 ("because we find no abuse of discretion in the court's striking of the expert testimony, and no additional relevant summary judgment evidence, we affirm the court's order granting Defendants' motion for summary judgment as to these claims"); *Rosen, supra*, 78 F.3d at 320 ("The district court was within its discretion in concluding that the scientific evidence of causation that the plaintiff offered was not admissible, and therefore in dismissing the suit"); *Buckner, supra*, 75 F.3d at 292, 294 ("We review a district court's rulings on evidentiary matters for abuse of discretion, giving the trial judge much deference"; summary judgment affirmed).

exclude expert evidence, as well. *See, e.g., Peitzmeier v. Hennessy Indus., Inc.*, 97 F.3d 293, 297 (8th Cir. 1996); *Cummins v. Lyle Indus.*, 93 F.3d 362, 367-70 (7th Cir. 1996); *American & Foreign Ins. Co., supra*; *Allen v. Pennsylvania Eng'g Corp.*, 102 F.3d 194 (5th Cir. 1996); *Barrett, supra*; *Goewey, supra*; *Brown v. Miska*, 1995 U.S. Dist. LEXIS 17197 at *11 (S.D. Tex. July 19, 1995), *aff'd without op.*, 96 F.3d 1445 (5th Cir. 1996); *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387 (D. Or. 1996); *Arrendondo v. Uniroyal Goodrich Tire Co.*, 1995 U.S. Dist. LEXIS 19943 (D. Ariz. Aug. 14, 1995); *Hopkins v. NCR Corp.*, 1994 U.S. Dist. LEXIS 17273 at *20, 22 (M.D. La. Nov. 17, 1994); *Stanczyk v. Black & Decker, Inc.*, 836 F. Supp. 565 (N.D. Ill. 1993). The fact that more appellate cases deal with the exclusion of evidence should not come as a surprise, and provides no justification for a stricter standard of review. A losing party is more likely to appeal an exclusion decision than an admission ruling involving testimony found to be reliable.

D. No Reason to Distinguish Rule 702 From Other Evidence Rules

The Rules of Evidence are interdependent, and require flexibility in application. *See generally* F.R.E. 102, Weinstein, *supra* at ¶ 102.02[1],[2]. The Rules require the trial courts to weigh competing interests, working toward fulfilling the goal "that the truth may be ascertained and the proceedings justly determined." F.R.E. 102. Those objectives require the court to exercise discretion; that discretion is broad when the trial court is proceeding, as Rule 102 directs, to balance the objectives of the Rules in a particular case. Weinstein, *supra* at ¶ 102.03. The trial court must balance competing interests in every evidence ruling it makes.

Rule 702 determinations turn on whether the evidence will be helpful to the jury. Rule 403 determinations are similarly governed. There is no mechanical formula to

determine helpfulness or relevance. The exercise of discretion is inherent in both rules. If an abuse of discretion standard is appropriate anywhere, it is appropriate for decisions concerning the admissibility of expert evidence.

There is no reason to distinguish between the standard of review of lower court expert admissibility determinations from other evidentiary decisions. In each instance, the trial court applies the Rules to the facts on a case by case basis. Admissibility decisions based on Rules 702 or 703 are much like decisions based on Rule 403. Rule 403 is reviewed for abuse of discretion, even though application of that Rule may result in preclusion of evidence, which itself may result in summary judgment or a directed verdict. Thus, in *Lucas v. Bechtel Corp.*, 800 F.2d 839, 849 (9th Cir. 1986), the Ninth Circuit upheld the trial court's exclusion of evidence pursuant to Rule 403, stating: " 'Our review of rulings on evidence is limited to abuse of discretion, even in the context of appeals from a directed verdict.' [citations omitted] We find no abuse of discretion."

Several months ago, this Court affirmed that the standard of review applicable to evidentiary rulings of the district court is abuse of discretion. *Old Chief v. United States*, —— U.S. ——, 117 S. Ct. 644, 647 n.1 (1997) (*citing United States v. Abel*, 469 U.S. 45 (1984)). In *Old Chief*, the Court applied the abuse of discretion standard to a trial court's Rule 403 ruling that evidence of a criminal defendant's prior crime was admissible. Similarly, *Abel* involved a trial court's admission of evidence concerning the defendant's involvement in a prison gang. These cases show that even when a defendant's liberty is at stake, the trial court's evidentiary rulings are given deferential review.

Case law is replete with examples of courts applying an abuse of discretion standard to evidentiary decisions, which of necessity involve mixed questions of law and

fact.[11] That standard has been applied even in cases where summary judgment or a directed verdict has resulted. *See Hawkins v. Hennepin Technical Center*, 900 F.2d 153, 155 (8th Cir. 1990) (Eighth Circuit reversed summary judgment for the defendant in a disparate treatment sex discrimination case, holding that the district court abused its discretion under Rule 402 in barring the plaintiff from introducing evidence of prior sexual harassment of herself and other employees); *Gagne v. North-*

[11] *United States v. Guerrero-Cortez*, 110 F.3d 647 (8th Cir. 1997) ("We review [Rule 403] evidentiary rulings for an abuse of discretion"); *United States v. Rose*, 104 F.3d 1408, 1413 (1st Cir. 1997) ("Review of the trial court's [Rule 403] evidentiary rulings is for abuse of discretion."); *United Sttaes v. Kizeart*, 102 F.3d 320, 325 (7th Cir. 1996) ("Our court reviews a district court's evidentiary decisions under Rule 403 solely for an abuse of that discretion."); *Pandit v. American Honda Motor Co.*, 82 F.3d 376, 379 (10th Cir. 1996) (appellate court reviews evidentiary rulings for abuse of discretion); *United States v. Karterman*, 60 F.3d 576, 578 (9th Cir. 1995) (Rule 403 and 404(b) evidentiary rulings reviewed for abuse of discretion); *Eiland v. Westinghouse Elec. Corp.*, 58 F.3d 176, 180 (5th Cir.1995) ("[W]e show considerable deference to the district court's [Rule 401 and 403] evidentiary rulings, reviewing them only for abuse of discretion."); *United States v. Boyd*, 53 F.3d 631, 636 (4th Cir. 1995) ("We review a district court's [Rule 401, 402 and 404(b)] evidentiary ruling for an abuse of discretion."); *United States v. Peters*, 15 F.3d 540, 545 (6th Cir. 1994) (Rule 404(b) evidentiary ruling reviewed under an abuse of discretion standard); *Petruzzi's IGA Supermarkets v. Darling-Delaware Co.*, 998 F.2d 1224, 1287 (3d Cir. 1993) ("While ordinarily we review a district court's admissibility rulings under an abuse of discretion standard, when the court's ruling turns on an interpretation of a Federal Rule of Evidence the appropriate standard of review is plenary. [citations omitted] Here, though we do discuss the interpretation of the Rules, at bottom we are using the deferential standard of review because the district court exercised discretion under Rule 403 in excluding the expert testimony"); *United States v. Fortenberry*, 971 F.2d 717, 721 (11th Cir. 1992) ("We review a district court's [Rule 404(b)] evidentiary rulings for abuse of discretion."); *Purnell v. Lord*, 952 F.2d 679, 685 (2d Cir. 1992) ("Evidentiary rulings under Rule 403 are reviewed under an abuse of discretion standard.").

western National Ins. Co., 881 F.2d 309 (6th Cir. 1989) (Sixth Circuit affirmed summary judgment for the defendant employer and stated the trial court did not abuse its discretion in finding irrelevant and overly prejudicial the plaintiff's basis of her claim of age discrimination, *vis*, one isolated comment by her boss).

Like determinations of the admissibility of expert evidence, evidentiary rulings based on Rule 403 involve a trial court's weighing of legal factors as applied to a specific factual context, which often involves credibility and other issues that a trial court is much better situated to analyze than appellate courts. For this reason, appellate courts have historically entrusted evidentiary rulings to the trial court, and will only question such rulings where there is an abuse of discretion or manifest error. This Court has explicitly entrusted Rule 702 analyses to trial courts; it gave trial courts guidance on what standards to utilize; they are best situated to marshal the facts, assess credibility, consider the proffer in the specific context of the case, and apply the law. There is no reason to remove this trust now, and substitute the judgment of a remote appellate court.

E. The Abuse of Discretion Standard Makes Sense As Applied to Trial Court Rulings on Expert Testimony

The *Joiner* court imposed a stricter standard of review on the trial court's exclusion of expert testimony, relying largely on precedent from the Third Circuit. Yet, before the *Daubert* decision, the Eleventh Circuit and the Third Circuit, like other circuits, recognized that an abuse of discretion applied to review of evidentiary rulings. *See, e.g., United States v. McGlory*, 968 F.2d 309, 345 (3d Cir. 1992); *Hancock v. Hobbs*, 967 F.2d 462, 468 (11th Cir. 1992); *Busby v. City of Orlando*, 931 F.2d 764, 784 (11th Cir. 1991); *United States v. Leo*, 941 F.2d 181, 197 (3d Cir. 1991). Why should the standard be changed considering this Court in *Daubert* merely expanded the

criteria for the trial court to consider in determining the reliability of evidence? Reliability has always been required; that is the critical element upon which the admissibility decision is made.

The case law is replete with examples of trial courts carefully considering the reliability of proffered expert testimony before *Daubert*, and admitting it or excluding it based on factors similar to those adopted by this Court later in *Daubert*. For example, Judge Becker in the Third Circuit taught that the abuse of discretion standard is particularly appropriate in reviewing issues related to the admission of expert testimony, where the inquiry involves a balancing test which incorporates important policy elements of Rule 702 and Rule 403. *United States v. Downing*, 753 F.2d 1224, 1240 (3d Cir. 1985). A precursor to *Daubert*, the court outlined a new standard directing the trial court to follow in determining admissibility: preliminary inquiry into the soundness and reliability of the expert's process or technique, consideration of whether the testimony would likely overwhelm, confuse or mislead the jury, and consideration of relevancy. *Id.* This inquiry involves balancing of policies, a task that the trial court is particularly suited to do, regardless that the question of admissibility is a mixed question of law and fact. *Id.*

Before *Daubert*, there was little suggestion that any standard other than abuse of discretion should be used to review the trial court's decisions on admitting expert testimony. *Soden, supra*, 714 F.2d at 502. In *Soden*, the court, using Rule 703 as its foundation, explained that the federal rules require the trial court to examine the reliability of sources for the expert's opinion, even though wide latitude was given to the expert in choosing the sources relied upon. Rule 703 broadened considerably the permissible basis for experts' opinions, which had been limited at common law. *Id.* That, along with the helpful-

ness standard of 702, formed the basis for the notion that the federal rules "liberalized" the rules concerning the admissibility of expert testimony. *See Arcoren, supra; Krist, supra; Bauman, supra; Seese, supra; Merit Motors, supra.* However, while the criteria was broadened, the threshold for reliability was not lowered to permit unreliable evidence to come in at trial. The trial court is indeed best situated to resolve admissibility issues, considering the inquiry into whether reliability has been established must be made on a case by case basis, focusing on the reliability of the opinion and its foundation. *Soden* at 503.

Indeed, the inquiry under Rule 702 and Rule 703 focuses on helpfulness to the jury. That element, which is said to be the touchstone of Rule 702, is the essence of Rule 403. Unless the evidence is reliable, it will not be helpful to the jury. Unless the evidence is reliable, its prejudice outweighs its probative value. The helpfulness requirement, according to Judge Becker, implies "a quantum of reliability" above and beyond "logical relevancy." *Downing, supra*, 753 F.2d at 1240. Accordingly, the trial court must explore the soundness and reliability of the process or technique used by the expert considering factors like those adopted by this Court in *Daubert*. This concept came in part from Judge Weinstein, writing first in 4 J. Weinstein and M. Berger, *Weinstein's Federal Evidence*, ¶ 702[03] (1st ed. 1975) at 702-36 to 702-37, and later in *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1223 (E.D.N.Y. 1985). In the latter, Judge Weinstein, like other trial judges before him,[12] carefully

[12] *See In re Swine Flu Immunization Prods. Liab. Litig.*, 538 F. Supp. 567 (D. Colo. 1980); *In re Swine Flu Immunization Prods. Liab. Litig.*, 508 F. Supp. 897 (D. Colo. 1981), *aff'd Lima v. United States*, 708 F.2d 502 (10th Cir. 1983); *Shatkin v. McDonnell Douglas Corp.*, 727 F.2d 202 (2d Cir. 1984) (trial court had discretionary right under Rule 703 to exclude expert testimony which would have hopelessly confused and misled the jury).

examined the underlying basis for an expert's opinion, recognizing full well the ability of expert testimony to overwhelm the jury with that dazzle of apparent expertise which may add confusion, not clarity, to the resolution of the issues. This Court acknowledged that problem in *Daubert*, by citing to Judge Weinstein's discussion of the need to conduct a Rule 403 analysis of proffered expert testimony exploring possible prejudice against probative force. *Daubert* at 595.

In *Daubert*, this Court reaffirmed its confidence in the trial court's ability to undertake the necessary review to determine the reliability, and hence the admissibility of expert testimony. *Daubert* provides a non-exhaustive list of factors to consider and expands the trial court's discretion to consider other factors as may be appropriate to a particular case. The Court reemphasized the need for reliable evidence, entrusting to the gatekeeper the job of admitting only what is reliable and relevant. *Daubert* at 589, 597. It defies logic that the Court would expand the trial court's discretion in making the decision, and then impose a standard of appellate review that gives less deference to the exercise of that discretion. The trial courts proved themselves up to the task pre-*Daubert*. Nothing since should have called their capacity into question.

F. The Proposed "Particularly Stringent" Standard Has No Meaning

The new "particularly stringent" standard of *Joiner* has no meaningful definition. *Joiner* is like other cases which have used a "heightened scrutiny" standard or taken a "hard look" or used a "sharp eye" without defining the parameters to permit generalization to other cases. The words fade into indistinguishable shades of gray, proving little assistance to the courts and the parties. Without an historical basis or good definition for the new *Joiner* standard, appellate courts have little guidance as to how to

apply the standard. Does it lend itself to a result-oriented review? Is the *Joiner* standard at the point where "discretion is a gossamer film, so limp and feeble that appellate judges find no obstacle at all to their contrary views?" Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 Syracuse L. Rev. 635, 651 (1971). If reliability is merely in the "eye of the beholder" the appellate court is invited to step into the shoes of the trial court. For what reason? It is in no better position to make the determination; in fact, the appellate court is hobbled by its inability to consider fully the evidence in the context of the entire case.

G. Multiple Standards Applied to Different Admissibility Factors Unnecessarily Complicates the Review

Some circuits have recently utilized multiple standards of review, dissecting the admissibility decision into hard to isolate components. For example, in *Cook v. American S.S. Co.*, 53 F.3d 733, 738 (6th Cir. 1995), the Sixth Circuit, finding the traditional abuse of discretion standard is "an oversimplification" and "often incorrect," applied three different standards of review to one basic decision: the admissibility of an opinion from an expert.[18]

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[18] The *Cook* Court stated:

> Appellate review of trial court rulings on the admissibility of expert opinion testimony under Fed. R. Evid. 702, depending upon the assignment of error, may involve as many as three separate standards of review. The trial court's preliminary fact-finding under Rule 104(a) is reviewed for clear error. These facts include, but are not limited to, whether the witness's "knowledge, skill, experience, training, or education," Fed. R. Evid. 702, are such as to qualify him or her to testify as an expert at all, and it may include a determination of the tests or experiments that the proffered expert conducted, if any. The court's determination whether the opinion the expert wishes to offer is properly the subject of "scientific, technical, or other specialized knowledge" is a question of law we review de novo . . . . A comparable duty is imposed upon the trial court when the subject of the proposed opinion testimony is

A multiple standard of review is unwieldy when actually put into practice. In fact, later the Sixth Circuit rejected this approach in *United States v. Jones*, 107 F.3d 1147 (6th Cir. 1997). The *Jones* court criticized *Cook's* unnecessary hair splitting, adhering to the abuse of discretion standard for determinations about whether the proffered evidence is scientific knowledge that will assist the trier of fact and the qualification of the witness.

In many cases it is a complex and needlessly onerous task for a court to distinguish precisely between the issue of qualifications, training and experience, reliability and relevance considerations. The *Jones* court explained that, because certain expert testimony "does not always neatly separate itself from whether the particular expert in the case is qualified and whether the testimony will be helpful to the trier of fact, application of a *de novo* standard to this particular prong could be difficult." *Id.* at 1154. Some experts' "experience and training bear a strong correlation to the reliability of the expert's testimony." *Id.* at 1155. Although experience alone does not ensure either reliability or admissibility, it plays enough of a role in the reliability analysis in the context of certain experts "to blur the distinctions between the three separate prongs in *Cook*." *Id.* Thus, the multiple standard approach advocated in *Cook* is difficult to apply to the vast array of expert testimony encountered by courts on a day to day basis. This difficulty was acknowledged in *Petruzzi's IGA Supermarkets, supra,* when the court discussed the multiple intertwined issues which the courts must consider in determining the admission or exclusion of expert evidence. To

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not "scientific" knowledge, but "technical, or other specialized knowledge." Finally, the trial court's determination whether the proffered expert opinion "will assist the trier of fact to understand the evidence or to determine a fact in issue," Fed. R. Evid. 702, is a relevancy determination and therefore one we review for abuse of discretion.

53 F.3d at 788.

dissect the issues, calling one a question of fact or another a question of law fails to recognize how interpendent the prongs of the analysis are. Indeed, a holistic approach to evidence is inherent in the Rules, and is particularly important when considering expert evidence.

The multiple standard approach should also be rejected because it is unnecessary; a singular abuse of discretion standard already addresses that which the multiple standard approach is meant to manage. If a district court incorrectly decides a legal issue during the course of a hearing on the admissibility of expert testimony, then that court has abused its discretion. *See Koon v. United States*, ——U.S.——, 116 S. Ct. 2035, 2047 (1996) ("A district court by definition abuses its discretion when it makes an error of law."); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990) ("An appellate court would be justified in concluding that, in making [legal] errors, the district court abused its discretion.") A *de novo* standard of review is not needed where a trial court commits an error of law.

II. THE HISTORICAL UNDERPINNINGS FOR DEFERENTIAL ABUSE OF DISCRETION STANDARD REMAIN VITAL TODAY

A. Over 100 Years of Precedent For Abuse of Discretion Standard

Since 1892 this Court has respected the exercise of discretion vested in trial courts, overturning a decision only where the exercise of such discretion has been manifestly abused, and there has been a wanton disregard of justice. *Earnshaw v. United States*, 146 U.S. 60, 67-68 (1892). As noted in *Earnshaw*, the general rule is that "some presumption is to be indulged in favor of the propriety and legality" of the exercise of discretion. The same year in *Means v. Bank of Randall*, 146 U.S. 620, 629 (1892), the Court stated that, "The question . . . is one ordinarily

addressed to the sound discretion of the trial court, and in the present case no abuse of that discretion is shown." By 1895 the Court recognized that discretionary actions of the trial court are "not subject to review by this court, unless it be clearly shown that such discretion has been abused"; the Court stated that this concept "is settled by too many authorities to be now open to question." *Isaacs v. United States*, 159 U.S. 487 (1895). Yet, over one hundred years later that concept is being questioned in the context of the admissibility of evidence, an issue falling squarely within the discretion of the court.

As recently as January of this year, this Court recognized that where the trial court is empowered to exercise its discretion, the trial judge should enjoy great deference in such matters, and appellate review of that discretion is the deferential abuse of discretion standard. *Old Chief, supra*, 117 S. Ct. at 647 n.1 (*citing United States v. Abel, supra*, 469 U.S. at 54-55). Different verbal formulas as to what the "abuse of discretion" standard of review requires have been propounded.[14] No matter the formulation, the result is that the reviewing court must accord substantial deference or "great weight" to the district court's judgment.[15]

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[14] Abuse of discretion standard applies when the court bases its judgment on an erroneous view of the law or erroneous assesment of the evidence, *Cooter, supra*, or, is guided by erroneous legal conclusions, *Koon, supra*, or is otherwise "manifestly erroneous." *Salem, supra*, 370 U.S. 31. The theme is lack of reasonableness for the decision: the court's decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons, *State ex rel. Carroll v. Junker*, 482 P.2d 775, 784 (Wash. 1971); no reasonable man [or woman] would take the view adopted by the [decision maker], *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 115 (3d Cir. 1976); "[n]ot just clearly incorrect, but downright unreasonable." *Fuller v. CBT Corp.*, 905 F.2d 1055, 1058 (7th Cir. 1990).

[15] The "great weight" standard was codified as the "clearly erroneous" standard of Rule 52 when the Federal Rules of Civil Procedure were adopted. K. Kunsch, *Standard of Review (State and Federal): A Primer*, 18 Puget Sound L., Rev. 11, 17 (Fall 1994) (hereinafter, "Kunsch"). See 9A Charles A. Wright & Arthur Miller, *Federal Practice and Procedure*, § 2571 (2d ed. 1994).

No less deference has been afforded when dealing with evidentiary matters than with other discretionary decisions of a trial judge. In such instances the Court looks to the nature of the decision, rather than conducting an analysis of whether a question of fact or law is involved. "A district court is accorded a wide discretion in determining the admissibility of evidence under the Federal Rules." *United States v. Abel, supra*, 469 U.S. at 54. Commensurately, "[t]he standard of review applicable to the evidentiary rulings of the district court is abuse of discretion." *Old Chief, supra*, 117 S. Ct. at 647 n.1 (1997) (finding abuse of discretion under Fed. R. Evid. 403 in the district court's rejection of offer to stipulate to prior conviction, and admitting full record of prior judgment.) As noted above, this same standard of review has been applied to matters of expert evidence. *Salem, supra*, 370 U.S. 31; *Spring, supra*, 99 U.S. at 658 (1879) (receipt or exclusion of expert evidence by trial court will not be reversed unless the ruling is manifestly erroneous).

B. The Rationale For Abuse of Discretion Standard In Evidentiary Matters

The primary reason for the use of a deferential standard of review is the type of decision at issue. This Court has recognized the difficulty in using the legal/factual distinction as the basis for the resulting standard of review. *Cooter & Gell, supra*, 496 U.S. at 401 (1990).[16] If the

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[16] In *Petruzzi's IGA Supermarkets, supra*, the court spoke about the three intertwined reasons for excluding testimony under Rule 702: if the testimony will not assist the trier of fact, if it is not sufficiently reliable, and if the expert lacks qualifications. Those factors have overlapping elements which render them nearly inextricable. To suggest, as the *Joiner* court does, that one is a question of fact and another is a question of law requiring different

question is a mixed question of law and fact, this Court has looked to practical considerations as to whether a deferential or other standard of review will be used. *Ornelas v. United States*, —— U.S. ——, 116 S. Ct. 1657, 1664-65 (1996) (Scalia J., dissenting).

One practicality is "an accommodation of the respective institutional advantages of trial and appellate courts." *Salve Regina College v. Russell*, 499 U.S. 225, 233 (1991). For example, a deferential review of mixed questions of law and fact is warranted when it appears that the district court is "better positioned" than the appellate court to decide the issue in question. *Id.; Miller v. Fenton*, 474 U.S. 104, 114 (1985) ("as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question."). Such circumstances include where a district court, "[f]amiliar with the issues and litigants . . . is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard. . . ." *Cooter & Gell, supra*, 496 U.S. at 402; or the trial judge is in a better position to make determinations of credibility, or has, as an inherent result of his role, expertise in making the determination at issue, *Anderson v. Bessemer City*, 470 U.S. 564, 574-75 (1985); or the issue involves supervision of litigation. *See Pierce v. Underwood*, 487 U.S. 552, 558 n.1 (1988).

Deferential review is warranted when "probing appellate scrutiny will not contribute to the clarity of legal doctrine." *Salve, supra*, 499 U.S. at 233; *Miller v. Fenton, supra*, 474 U.S. at 114; *see also Cooter & Gell, supra*, 496 at 402. Clarification of the law requires generalization. As this Court recognized, "[o]ne of the 'good' reasons for conferring discretion on the trial judge is the sheer impracticability of formulating a rule of decision for the matter in

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standards of review, demonstrates the futility of the exercise, and the reason abuse of discretion is the appropriate standard of review.

issue." *Pierce, supra*, 487 U.S. at 561 (*quoting* Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 Syracuse L. Rev. 635, 662-663 (1971). Deference to the district court is due where the matter is "precisely such a multifarious and novel question, little susceptible, . . . of useful generalization, and likely to profit from the experience that an abuse-of-discretion rule will permit to develop." *Id.* at 562.

The efficient allocation of judicial resources is also important. "The abuse of discretion standard acknowledges that appellate courts in general, and this Court in particular, should not expend their limited resources making determinations that can profitably be made only at the trial level." *Wayte v. United States*, 470 U.S. 598, 624-25 (1985) (Marshall, J., Brennan, J., dissenting). Deference is due to the trial court where even if the appellate court can acquire the district judge's full knowledge of the factual setting, such acquisition will come at unusual expense of substantial judicial time and resources. *Pierce, supra.* This is true particularly where "[d]uplication of the trial judges' efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources." *Anderson, supra*, 470 U.S. at 574-575.

Further, there is the issue of finality, and the effect of the choice of standard of review on the appellate dockets. "The more deference given to the decision of the lower tribunal, the less likely the losing party is to appeal that decision. Regardless of the outcome, parties will at least have the satisfaction of knowing that the issue has been determined and they can move on with their lives." Kunsch, at 19-20. As noted in *Cooter & Gell*, 496 U.S. 384 at 404:

> [D]eference will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed

and considered by the district court; it will also discourage litigants from pursuing marginal appeals, thus reducing the amount of satellite litigation.

Each and every reason for application of a deferential standard of review applies to trial court decisions on the admissibility of expert evidence. They apply with as much force when the trial court is challenged for excluding the evidence as when it is challenged for admitting it.

CONCLUSION

This court should reaffirm the deferential abuse of discretion standard for review of all trial court rulings concerning the admissibility of expert testimony, regardless of the result of the ruling. This case should be remanded to the Eleventh Circuit for reconsideration and application of the abuse of discretion standard to the issues presented.

Respectfully submitted,

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APPENDIX

APPENDIX

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American Automobile Manufacturers Assn.
American Brands, Inc.
American Home Products Corporation
American Suzuki Motor Corporation
Andersen Corporation
Anheuser-Busch Companies
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Monsanto Company
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Navistar International Transportation Corp.
Nissan North America, Inc.
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Otis Elevator Co.
Owens-Corning Fiberglas Corporation
PACCAR, Inc.
Panasonic Company
Pentair, Inc.
Pfizer, Inc.
Pharmacia and Upjohn, Inc.
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Raymond Corporation, The
RJ Reynolds Tobacco Company
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Simon Access-North America
Smith & Nephew Richards, Inc.
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Textron, Inc.
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TRW Inc.
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